



DRP STAFF MANUAL

ANTI-DISCRIMINATION AND FAIR HOUSING



The purpose of this manual is to guide Department of Regional Planning staff in the application of fair housing and other anti-discrimination laws in planning activities.

This document covers the following topics:

1. Protected Statuses
2. Fair Housing and Disability
3. Protections for Residential Uses
4. Religious Discrimination

1. PROTECTED STATUSES

State and federal law protects certain individuals and groups from discrimination in housing and land use decisions. The protected statuses include:ⁱ

- Race
- Color
- Religion
- Sex / Gender Identity
- National Origin
- Familial Status (whether or not a household has children)
- Disability
- Marital Status
- Ancestry
- Sexual Orientation
- Source of Income
- Age (not including preferences imposed by a senior housing program)
- Veteran Status
- Income Level
- Method of Financing

In general, state and federal law defines discrimination to mean any distinction, exclusion, restriction or

preference, which has the purpose or effect of limiting any right or freedom.ⁱⁱ In the planning context, discrimination may include considering the above listed protected statuses to limit land use or housing opportunities.ⁱⁱⁱ

The U.S. Department of Justice and the California Department of Fair Employment and Housing enforce anti-discrimination laws. These agencies report that today, the most common type of discrimination cases in planning and zoning are related to religion, disability or income.

PREFERENTIAL TREATMENT^{iv}

While local governments must treat residential developments that may be used or occupied by persons of protected status equally to any other residential developments, the law does not preclude actions or regulations that provide preferential treatment in certain instances, such as:

- Residential developments or emergency shelters financially assisted by a public entity;
- Any housing intended for use or occupancy by low, moderate or middle-income households; and
- Housing for agricultural workers.

This preferential treatment may include, but need not be limited to, reduction or waiver of fees or changes in architectural requirements, site development and property line requirements, building setback requirements, or vehicle parking requirements that reduce development costs. Some jurisdictions incentivize housing for senior citizens. It is not appropriate to offer preferential treatment on the basis of other statuses, such as race, sexual orientation or national origin.

2. FAIR HOUSING AND DISABILITY

Multiple state and federal laws provide protections for persons with disabilities, who may experience discrimination, including:

- Title VIII of the Civil Rights Act of 1968 (Fair Housing Act, as amended) prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, and requires housing providers and local governments to make reasonable accommodations;
- The Americans with Disabilities Act (ADA), prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance;
- Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance, such as grant monies for housing developments.

DEFINITION OF DISABILITY

According to the California Fair Employment and Housing Act, disability^v is defined as a physical or mental impairment that limits one or more major life activities. A person is considered disabled if they have a history of disability, or if they are regarded as having a disability.^{vi}

- “Limits” means that the activity is difficult to achieve, regardless of mitigating measures such as medication or mobility devices, or previous reasonable accommodations.
- “Major life activity” means any task central to most people’s daily lives, such as but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This can include brushing one’s teeth, getting dressed, bathing, household chores, preparing meals, etc.
- “Physical or mental impairment” includes chronic or episodic medical conditions and genetic or inherited characteristics that cause disease or disorders. Impairments can include, but are not limited to orthopedic, visual, speech and hearing impairments, cosmetic disfigurement, anatomical loss, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, alcoholism and drug addiction. ^{vii,viii}

Current users of illegal drugs are not covered by Fair Housing laws, unless they have another disability. A temporary condition, such as a broken leg, pregnancy, use of crutches, etc. may not qualify as a physical or mental impairment.

The protections afforded to people with disabilities also extend to those associated with them. For example, providers and developers of housing for people with disabilities have “standing” to file a court action alleging a violation under either federal or state fair housing laws or seek administrative relief.

STRUCTURAL ACCESSIBILITY FOR THE DISABLED

Disability discrimination is a unique issue in planning and development, in part because people with disabilities can be discriminated against solely by the design of the built environment. In response, federal and state laws have established accessible design and construction requirements for certain structures and programs, such as multi-family housing, transportation and public and commercial facilities.

MULTI-FAMILY HOUSING

The Fair Housing Act establishes design and construction requirements for multifamily housing. The design requirements apply to certain buildings built for first occupancy after March 13, 1991.

Requirements for multifamily buildings of four or more units with an elevator:

- Public and common areas must be accessible to persons with disabilities;
- Doors and hallways must be wide enough for wheelchairs;

- All units must have:
 - An accessible route into and through the unit
 - Accessible light switches, electrical outlets, thermostats and other environmental controls
 - Reinforced bathroom walls to allow later installation of grab bars and
 - Kitchens and bathrooms that can be used by people in wheelchairs.

If a building with four or more units built after March 13, 1991 has no elevator, these standards apply to ground floor units.^{ix}

PUBLIC FACILITIES AND TRANSPORTATION

The Americans with Disabilities Act (ADA) requires that all government agencies provide equal access to public buildings, rights-of-way, telecommunications and public transportation.

PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

The ADA mandates standards for accessible design in many commercial businesses. Under Title III of the ADA, no individual, because of his or her disability, may be deprived of the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. "Public accommodations" include most places of lodging (such as inns and hotels), recreation, transportation, education, and dining, along with stores, care providers, and places of public displays, among other things. In addition, Title III requires existing facilities, when readily achievable, to remove any architectural barriers that make access difficult for persons with disabilities. Historic structures and private clubs or religious institutions may be exempt from the structural accessibility provisions of the ADA.

While construction standards are primarily implemented through the state and local building codes, planners should be familiar with these standards to point out any inconsistencies in site plan review or enforcement. In 2010, the Department of Justice adopted revised standards for accessible design.

PROGRAMMATIC ACCESSIBILITY FOR THE DISABLED

In addition to the prescribed structural accessibility standards above, state and federal law mandate procedural requirements that ensure that local government programs and services are accessible. When requested, the County must reasonably modify its policies, practices, or procedures and provide auxiliary aids and services to assist persons with disabilities in utilizing our services to ensure program accessibility unless the modifications would fundamentally alter the nature of the service, program, or activity. The Department staffs an accessibility coordinator to assist in providing auxiliary aids and services requests. Such services include, but are not limited to:

- TDD/TTY (telecommunications devices for the deaf and mute);
- Re-producing materials in larger fonts;

- Sign language interpreters; and
- Closed –captioning for video presentations.

REASONABLE ACCOMMODATION FOR HOUSING ACCESS

A reasonable accommodation is a change, adaptation or modification to a policy, program, service or workplace, which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, or perform a job. Since persons with disabilities may have special needs due to their disabilities, simply treating them exactly the same as others may not ensure that they have equal opportunity.

Reasonable accommodations include those that are necessary in order for the person with a disability to use and enjoy a dwelling, including public and common use spaces. Under the Fair Housing Amendments Act and the ADA, local jurisdictions have an affirmative duty to make accommodations where accommodation may be reasonable and necessary under the law to ensure that people with disabilities have equal access to housing.

In order to show that a requested accommodation may be necessary, there must be an causal link, or nexus, between the requested accommodation and the individual's disability. What is reasonable must be determined on a case-by-case basis. According to federal law, there is a four-pronged test of reasonable accommodation:

1. Is the person requesting the accommodation a qualified person with a disability? Or does the requestor represent a qualified person with a disability?
2. Is there an causal link, or nexus, between the accommodation and the disability of the requestor?
3. Would the accommodation be a fundamental alteration to the nature of a program, or undermine the purpose of the program?
4. Would the accommodation impose an undue administrative or financial burden on the local jurisdiction?

For more information on the Department's procedure for reasonable accommodation, please refer to Title 22.

DEFINITION OF FAMILY

Persons with disabilities may be negatively affected by an illegal definition of family in a zoning code. A definition of "family" that distinguishes between related and unrelated persons, and imposes numerical occupancy limits on unrelated persons violates privacy rights^x and fair housing laws. This definition may prohibit the siting and development of congregate homes for individuals with disabilities, when these homes function as non-traditional families.^{xi}

A functional zoning code definition of family better addresses fair housing and privacy laws, while still maintaining the single-family character of the neighborhood. A functional equivalent of a traditional family consisting of unrelated persons can be evidenced by one or more of the following:

1. Single housekeeping unit;
2. Shared use of the entire structure;
3. Shares expenses for food, rent, utilities or other household expenses; and/or
4. More or less permanent living arrangement.

In addition to defining “family,” local jurisdictions may set reasonable maximum occupancy limits per dwelling unit or per cubic foot of air space, as long as those restrictions apply regardless of relation by blood, marriage or adoption. Maximum occupancy limits may be more restrictive than those outlined in the Uniform Building Code; however any occupancy standards should be applied notwithstanding the familial status of the occupants, except that different standards may apply to children than adults.

3. PROTECTIONS ASSOCIATED WITH RESIDENTIAL USES

To further fair housing goals, state law protects certain residential uses through zoning preemption or other limits on local regulation. Income level and method of financing are protected statuses only when associated with a residential use. This law is intended to eliminate discriminate against public housing developments or non-profit housing providers. A local jurisdiction may not deny, condition a project, or impose different requirements, based on, in whole or in part,

- The income level of the future occupants; or
- The financing mechanism of the development.^{xii}

The state identifies a need for multifamily housing, and extends the following protections to multi-family developments. Multifamily projects may not be denied, or conditioned in a manner that renders the project infeasible, because either:

- a) The project is consistent with the local jurisdiction’s zoning ordinance and general plan; or
- b) The project is consistent with the general plan, but not the zoning ordinance, because the zoning ordinance has not been updated to reflect the more recently updated general plan.^{xiii}

AFFORDABLE HOUSING DEVELOPMENTS

The Housing Accountability Act protects housing for very low, low, moderate and/or middle-income households.^{xiv} A local jurisdiction cannot disapprove a housing development project, including farmworker housing, for very low, low-, or moderate-income households, or an emergency shelter, or condition these uses in a manner that renders them infeasible, including through the use of design review standards, unless it makes written findings, based upon substantial evidence in the record, as to one of the following:

1. The jurisdiction has a certified Housing Element, and has met its share of housing need for the income category proposed to occupy the development;
2. The project would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid this impact without rendering the development unaffordable or financially infeasible;
3. The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable or financially infeasible;
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project; or
5. The project is inconsistent with both the zoning ordinance and general plan (land use or housing element) as it existed on the date the application was deemed complete, and the housing element is in substantial compliance.

In addition, state law limits the application of conditional use permits to certain attached housing developments available to very low, low or moderate-income households. The project must be affordable for a period of at least thirty years, and either statutorily exempt from CEQA^{xv} or have other infill characteristics as provided by Government Code Section 65589.4.^{xvi}

SUPPORTIVE/TRANSITIONAL HOUSING

Supportive housing is housing that is linked to onsite or offsite services that assist residents in retaining the housing, improving their health status, and maximizing their ability to live and, when possible, work in the community. There is no limit to length of stay. Transitional housing is assisted rental housing or supportive housing, but operated under program requirements that call for the termination of assistance and recirculation of the assisted unit to another eligible program recipient at some predetermined future point in time, no less than six months. Both supportive and transitional housing serve persons with low incomes having one or more disabilities, including among other populations, adults, emancipated youth, families, families with children, elderly persons, young adults aging out of the foster care system, individuals exiting from institutional settings, veterans, and homeless people.

Transitional housing and supportive housing must be treated the same as any other residential use within the same zone. For example, when multifamily residential developments are permitted in the zone, the local government cannot impose any additional restrictions on supportive housing than what are imposed on other multifamily units. In addition, transitional and supportive housing may not be denied if consistent with the zoning and the local jurisdiction has not yet met its need for new housing units affordable to the income levels to be served by the proposed project, except in limited circumstances.

EMERGENCY SHELTERS

Emergency shelters must be permitted as a by-right use in at least one zone with sufficient capacity to meet the jurisdiction's need. Emergency shelters may only be subject to those development and management standards that apply to residential or commercial development within the same zone except that a local government may apply written, objective standards that include only the following:

- a) The maximum number of beds or persons permitted to be served nightly by the facility;
- b) Off-street parking based upon demonstrated need, provided that the standards do not require more parking for emergency shelters than for other residential or commercial uses within the same zone;
- c) The size and location of exterior and interior onsite waiting and client intake areas;
- d) The provision of onsite management;
- e) The proximity to other emergency shelters, provided that emergency shelters are not required to be more than 300 feet apart;
- f) The length of stay;
- g) Lighting; and
- h) Security during hours that the emergency shelter is in operation.

FARMWORKER HOUSING

In addition to the protections provided by the Housing Accountability Act, the state identifies farmworkers as the lowest average wage earners and has enacted laws that regulate the siting of farmworker housing. For the purposes of zoning and land use, farmworker housing for five, but no more than six farmworkers must be considered a single-family structure and treated as a residential land use. In addition, farmworker housing consisting of no more than 36 beds in group living quarters or 12 units or spaces for farmworkers and their households, must be treated as an agricultural land use. For more information on the County's farmworker housing ordinance, see Title 22.^{xvii}

ZONING PREEMPTION FOR LICENSED RESIDENTIAL USES

To further anti-discrimination laws, and to address identified needs, state law protects certain land uses from local zoning regulations that limit the siting and conditioning of the use. This means that local governments are limited in their application of zoning laws to such uses. Many of these "preemptions" only apply to uses of a certain occupancy size, such as six or fewer residents.^{xviii} Although these uses are protected to a specific occupancy, state law is silent on the regulation of these uses at greater occupancies. Irrespective of this silence, state and federal fair housing and anti-discrimination laws are otherwise applicable.

ALCOHOLISM RECOVERY FACILITIES

Alcoholism Recovery Facilities (RADTFs) provide food, shelter, and recovery services, on a 24-hour basis, for persons with alcohol and/or other drug abuse problems. Services include detoxification; group, individual or educational sessions; and/or recovery or treatment planning, but not medical care. These facilities are required to be licensed by the California Department of Alcohol and Drug Programs. For the

purposes of zoning, a RADTF with six or fewer residents, not including staff and operators, must be considered a single-family residential use.^{xix} Hospitals, clinics and "sober living" environments are not included in this category.

HEALTH FACILITIES

Health facilities include Residential Care Facilities for the Chronically Ill (RCFCI) and Intermediate Care Facilities (ICF). RCFCIs provide care and supervision to adults who have Acquired Immune Deficiency Syndrome (AIDS) or the Human Immunodeficiency Virus (HIV), and are licensed by the State Community Care Licensing Division. ICFs are health facilities licensed by the Licensing and Certification Division of the California Department of Public Health to provide 24-hour-per-day services. Both types may provide intermittent or continuous skilled nursing care. For the purposes of zoning, a RCFCI or ICF with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

COMMUNITY CARE FACILITIES

Community Care Facilities (CCFs) include Adult Residential Facilities (ARFs) and Children's Residential Facilities. CCFs are licensed by the Community Care Licensing Division of the State Department of Social Services to provide 24-hour non-medical residential care to children and adults with disabilities who are in need of personal services, supervision, and/or assistance essential for self-protection or sustaining the activities of daily living. Children's residential facilities include Group Homes, Foster Family Homes and Small Family Homes. These facilities are required to be licensed by the California Community Care Licensing Division. For the purposes of zoning, CCFs with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

RESIDENTIAL CARE FACILITIES FOR THE ELDERLY

Residential Care Facilities for the Elderly (RCFEs) provide care, supervision and assistance with activities of daily living, such as bathing and grooming. They may also provide incidental medical services under special care plans. The facilities provide services to persons 60 years of age and over and persons under 60 with compatible needs. The facilities can range in size from six beds or fewer to over 100 beds. The residents in these facilities require varying levels of personal care and protective supervision. For the purposes of zoning, a RCFE with six or fewer residents, not including staff and operators, must be considered a single-family residential use.

4. RELIGIOUS DISCRIMINATION

Enacted in 2000, the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits zoning and land use laws that substantially burden the religious exercise of churches or other religious assemblies or institutions unless implementation of such laws is the least restrictive means of furthering a compelling governmental interest.

In addition, RLUIPA prohibits zoning and land use laws that:

- (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;
- (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination;
- (3) totally exclude religious assemblies from a jurisdiction; or
- (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

Jurisdictions have discretion to regulate gathering places, including places of worship. However, any regulations placed upon religious uses must be at least as generous as the regulations applied to other gathering places. Specific zones may only exclude places of worship if they also exclude similar uses. In the evaluation of regulations for religious institutions, consider the requirements for other places where large groups of people assemble for secular purposes, including:

- Fraternal organizations;
- Theaters;
- Private clubs;
- Sports fields; and
- Meeting halls.^{xx}

5. DISCRIMINATION IN PLANNING ACTIVITIES

Discrimination claims can arise from either a discriminatory intent or a discriminatory effect. Discriminatory intent occurs when a policy, procedure or decision is clearly biased against a person or group of people based on protected status. Discriminatory effect occurs when a neutral policy, procedure or decision has an adverse disparate impact on a person or group of people with protected status.

Examples of discriminatory intent:

- A zone district that specifically does not permit affordable housing developments, but permits other types of housing;
- A project condition that requires a housing development for persons with disabilities to include excessive security features based solely on generalized assumptions about the needs of the disabled residents;
- A zoning ordinance that specifically does not permit synagogues, but allows for other places of worship and secular gathering places; and
- The denial of a permit for an Asian super-market because the decision makers reasoned that the development would be better situated in a predominantly Asian neighborhood.

Examples of discriminatory effect:

- A zoning code definition of family that precludes any number of unrelated persons from living together (discriminates against persons with disabilities);

- A permit condition that regulates visiting occupational therapists differently than it would visiting piano teachers (discriminates against persons with disabilities); and
- A comprehensive plan policy that allows only studio- and one-bedroom apartments to be constructed in the urban center (discriminates against families with children).

CASE PROCESSING

In reviewing project-specific development proposals, planners may encounter arguments for—or against—a project based on the future occupants’ or visitors’ statuses. Project proponents and opponents should be informed about fair housing rights and anti-discrimination laws. Likewise, decision-makers should be clear in public hearings that the characteristics of future occupants or visitors are immaterial to any decision about a development proposal. In addition, privacy rights make it illegal to discuss a person’s disability in a public hearing.^{xxi}

The following are some examples of factors that may not be considered in the discretionary review of development projects serving persons of protected status (not inclusive):

- a) Generalized public concerns and opposition to the use on the basis of protected status;
- b) In the case of housing, the fact that the project may be run for profit or require a state license;
- c) The existence of alternative neighborhoods in which the use could locate;
- d) A sense that a neighborhood or street already has its “fair share” of similar uses, or concerns that the use will “start a trend” of other similar uses;
- e) Concerns that the occupants will increase public service needs, such as fire, health and safety;
- f) Concerns that the residents or visitors are “incompatible” with the neighborhood character;
- g) Concerns that the residents or visitors will increase crime or other socially disruptive behavior;
- or
- h) Concerns that the use will decrease property values in the neighborhood.

Project conditions must also be non-discriminatory. Project conditions must not subject the use to requirements that would not otherwise be required of similar uses, if not for the status of the occupant or visitor. These include, but are not limited to, curfews, signage and more frequent inspections.

PLAN MAKING

Generally, avoiding language that calls out the protected status of any person or group avoids intentional discrimination. While it may be necessary to identify protected statuses in background research, analyses and outreach, it is safest to eliminate reference to status in policy, except in very limited circumstances. Some examples of when this may be appropriate include policies and programs that address the cultural and historic context and identity of a community (e.g. “Consider developing design guidelines for Chinatown that address the cultural history of Chinatown and Chinese immigration.” or “Maintain Olvera Street as a Mexican-American cultural landmark through historical and cultural references in public art and the design of public spaces.”). Some examples of discriminatory general plan policies may include those that reference specific religious denominations (e.g. “Support

the development of a new Cathedral on Oak Ave.”; “Restrict street parking adjacent to the Scientology center to Sundays and Wednesdays only.”); or limit the siting of uses associated with a protected status, such as age, disability or income (e.g. “Direct affordable housing to areas with existing infrastructure,”; “Discourage senior housing in hillside areas.”).

ⁱ Federal law uses the term “protected classes.” This document uses the term “protected statuses” to include those covered by state law.

ⁱⁱ California Government Code §8315

ⁱⁱⁱ California Government Code Section 65008 (1)

^{iv} California Government Code Section 65008 (e)(2)

^v California Government Code Sections 12955.3- 12926, and Title 42 United States Code 3601 et seq.

^{vi} The Fair Housing Act uses the term "handicap;" most state laws uses the term "disability" which has exactly the same legal meaning.

^{vii} The California Fair Employment and Housing Act (FEHA) mirrors the Fair Housing Amendments Act of 1988, except that the state statute defines disability more broadly to include any impairment that “limits” a major life activity, where the federal statute requires that the impairment “substantially limit” a major life activity.

^{viii} Two other federal laws offer protection against discrimination to people with disabilities; both may apply to local government land use and zoning activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in any program or activity that is conducted by the federal government or that receives federal financial assistance. The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits discrimination against individuals with disabilities in a number of areas, including all public services – irrespective of federal financial assistance. Both § 504 and the ADA require reasonable accommodation.

^{ix} Department of Housing and Urban Development. *Fair Housing Accessibility Guidelines*. 24 CFR Ch. I, Subch. A, App. II. 1991.

^x *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 133

^{xi} *Oxford House Inc. v. Babylon*, 819 F.Supp. 1179 (E.D. N.Y. 1993); *Oxford House v. Township of Cherry Hill*, 799 F.Supp 450 (D.N.J. 1992); *United States v. Schuylkill Township*, 1991 WL 117394 (E.D. Pa. 1990), reconsideration denied (E.D. Pa. 1991).

^{xii} California Government Code Section 65008(b) et seq.

^{xiii} California Government Code Section 65008(b)(1)(D)

^{xiv} California Government Code Section 65589.5 et seq.

^{xv} Projects must be statutorily exempt per Public Resources Code 21159.22, 21159.23, or 21159.24.

^{xvi} California Government Code Section 65589.4

^{xvii} California Government Code Sections 51220-51222; Health and Safety Code Sections 17021.5 and 17021.6

^{xviii} California Health & Safety Code Sections 1566 et seq.

^{xx} American Planning Association, *A RLUIPA Primer*. Planning Advisory Service (PAS), EIP-23. May 2009.

^{xxi} The California Public Records Act of 2004 (Government Code Sections 6250-6270) has exceptions for medical information.